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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JOHN RICHARD RYAN,

Defendant and Appellant.

H024260

(Santa Cruz County  
Super. Ct. No. S8-08315, F01925)

Defendant John Richard Ryan appeals after pleading guilty to possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)) and forgery (Pen. Code, § 470, subd. (a)), and admitting three prior prison term allegations (Pen. Code, § 667.5, subd. (b)). He was sentenced to a prison term of five years eight months.

On appeal, defendant contends: (1) the trial court erred by denying his motion to withdraw his pleas and admissions; (2) the trial court breached the terms of his plea bargain; and (3) the trial court erroneously imposed a \$1,000 restitution fine. We will reverse the judgment and remand to permit defendant to withdraw his plea.

**I. BACKGROUND**

The facts underlying defendant's offenses are not relevant to the issues he raises on appeal.

On March 18, 1998, defendant was charged, by information, in case No. S8-08315, with possession for sale of methamphetamine (count 1, Health & Saf. Code, § 11378) and possession of methamphetamine (count 2, Health & Saf. Code, § 11377, subd. (a)). The information alleged that defendant had suffered two prior felony convictions that qualified as “strikes” (Pen. Code, §§ 667, subds. (b)-(i), 1170.12), and that defendant had served five prior prison terms (Pen. Code, § 667.5, subd. (b)).

Pursuant to a plea bargain, defendant pled guilty to count 2 (possession of methamphetamine) and admitted three of the prior prison term allegations. Defendant was sentenced to a five-year prison term, consisting of a two-year term for the substantive offense and three one-year terms for the prior prison term allegations. However, execution of sentence was suspended and defendant was placed on probation for three years. Defendant was also ordered to pay a restitution fine of \$200 pursuant to Penal Code section 1202.4.

On January 4, 2001, defendant was charged, by information, in case No. F01925, with three counts of forgery (Pen. Code, § 470, subd. (a)). The information alleged that defendant had one prior conviction that qualified as a “strike” (Pen. Code, §§ 667, subds. (b)-(i), 1170.12) and that defendant had served five prior prison terms (Pen. Code, § 667.5, subd. (b)). Probation violation proceedings in case No. S8-08315 were set concurrently with proceedings in case No. F01925.

On March 20, 2001, pursuant to a plea bargain, defendant pled guilty to one count of forgery in case No. F01925. The People agreed to dismiss the other two counts of forgery as well as the “strike” and prior prison term allegations. The prosecutor made it clear that it was an “open” plea, with no promises in terms of sentence. The prosecutor noted that he “would be asking for prison” and that defendant’s “total exposure” was five years eight months. The trial court likewise informed defendant, “I haven’t decided what’s going to happen,” and told him that he could go to prison. Defendant indicated that he understood.

After defendant pled guilty in case No. F01925, the trial court found him in violation of probation in case No. S8-08315. The trial court set the sentencing hearing for April 24, 2001 on both cases. Defendant then requested that he be released briefly in order to make arrangements for some of his possessions. Trial counsel asserted that defendant was “probably not going to go anywhere” during this time because he had “virtually never been outside of the Santa Cruz community except the Department of Corrections.” Trial counsel acknowledged that defendant would be “guaranteeing a quick trip to prison if he screws up on a brief pass.”

The trial court agreed to give defendant a stay until March 23, 2001. The trial court ordered defendant to contact the probation department daily and warned defendant that if he did not return to jail on time, “then when you are back in you’re guaranteed to go back to the joint.”

On March 27, 2001, a bench warrant issued for defendant’s arrest for failure to appear. It is unclear when defendant was found. However, defendant appeared in court on September 7, 2001, and the sentencing hearing was reset.

Before the sentencing hearing, defendant moved to withdraw his guilty pleas and admissions in case No. S8-08315 and case No. F01925. He argued that in case No. S8-08315, the trial court had failed to advise him that he had a right to a jury trial regarding the prior prison term allegations. Defendant pointed out that the trial court had simply advised him that he had a right “to have a jury to decide whether you’re guilty or not guilty of *this offense*,” implying that the jury trial right pertained only to the substantive offense, not the prior prison term allegations. (Italics added.)

The trial court heard defendant’s motion to withdraw his pleas and admissions on December 21, 2001. It noted that it had considered the “totality of the circumstances” and that defendant was “not an unsophisticated newby into the system.” It opined that defendant simply had “buyer’s remorse” about his plea. Ultimately, the trial court denied the motion.

Sentencing was held on January 11, 2002. Trial counsel asked the trial court to consider placing defendant on probation again “given his age and many, many years he’s already spent in the Department of Corrections.” The prosecutor asked the court to impose the previously suspended five-year term in case No. S8-08315, with a consecutive term of eight months for the forgery in case No. F01925. The prosecutor reminded the trial court that it had told defendant that he would go to prison if he did not return from his three-day release.

The trial court stated, “I’m going to agree with the District Attorney at this point. I gave you the option. It wasn’t like you were gone for an extra two weeks or something, but you were gone, and when you didn’t return you were telling me, and I think the indication was back then that if you don’t come back, you’re telling me you don’t want a program. You don’t want probation. You want the five years. And I think it’s appropriate.”

The trial court then revoked probation in case No. S8-08315 and imposed the previously suspended five-year term for possession of methamphetamine. It also imposed a \$1,000 restitution fine in that case. In case No. F01925, it imposed a consecutive term of eight months for the forgery, and imposed a \$200 restitution fine.

## **II. DISCUSSION**

### ***A. Motion to Withdraw Pleas and Admissions***

Defendant contends the trial court erred when it denied his motion to withdraw his pleas and admissions. He asserts that he did not knowingly and intelligently waive his rights before admitting the prior prison term allegations in case No. S8-08315.

“[B]efore a court accepts an accused’s admission that he has suffered prior felony convictions” it must obtain “express and specific admonitions as to the constitutional rights waived by an admission” – “the same constitutional rights waived as to a finding of guilt in case of a guilty plea.” (*In re Yurko* (1974) 10 Cal.3d 857, 863; see *Boykin v.*

*Alabama* (1969) 395 U.S. 238; *In re Tahl* (1969) 1 Cal.3d 122.) When considering a claim of *Yurko* error, the court applies the standard announced in *People v. Howard* (1992) 1 Cal.4th 1132, 1175: “a plea is valid if the record affirmatively shows that it is voluntary and intelligent under the totality of the circumstances.”

Defendant relies on *People v. Bell* (1981) 118 Cal.App.3d 781 (*Bell*), disapproved by *In re Ibarra* (1983) 34 Cal.3d 277, 286.<sup>1</sup> In *Bell*, the defendant was charged with burglary and it was alleged that he had suffered a prior felony conviction. The defendant planned to plead guilty and admit the prior conviction. The trial court admonished the defendant as to the constitutional rights he was waiving, as follows. First, it asked, “ ‘Now, do you understand, Mr. Bell, that if you do plead guilty to the charge of *burglary*, that you’re giving up your right to have a trial?’ ” (*Id.* at p. 783, original italics.) Next, it informed the defendant, “Further, you are giving up your privilege to cross-examine, your right to cross-examine the witnesses for the prosecution. You give up that right if you plead guilty.” (*Ibid.*) Then it stated, “And further, and more importantly, by pleading guilty you are giving up your privilege against self-incrimination. You’re convicting yourself of *this offense*, and you don’t have to do that if you don’t wish to do it. It must be a free and voluntary decision on your part.” (*Id.* at pp. 783-784, original italics.) The trial court then accepted the defendant’s guilty plea and admission to the prior conviction allegation. On appeal, the court found two errors. First, the trial court had completely failed to inform the defendant that he had a right to a jury trial. (*Id.* at p. 784-785.) Second, the trial court had failed to advise the defendant that the rights and privileges also applied to the prior conviction allegation. (*Id.* at p. 785.)

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<sup>1</sup> *Ibarra* held that a personal advisement of rights by the trial court is unnecessary where the defendant executes a valid waiver form; the court disapproved contrary language in *Bell*.

In *People v. Forrest* (1990) 221 Cal.App.3d 675 (*Forrest*), the defendant also claimed that he had not been expressly advised as to the constitutional rights he was waiving when he admitted prior felony conviction allegations. The appellate court noted that the magistrate *had* informed the defendant of all his constitutional rights before accepting his pleas and admissions, and therefore interpreted his claim to be that “the magistrate must expressly and *separately* advise defendant of his right[s]” as to prior conviction allegations, even when defendant enters guilty pleas and prior conviction admissions in the same proceeding. (*Id.* at pp. 678-679, original italics.) The court rejected this claim: “There is nothing in *Yurko* or the cases cited by defendant which requires a separate advisement and waiver of rights where, as here, defendant in a single proceeding pleads guilty to a current charge and also admits that he suffered prior convictions.” (*Id.* at p. 679.)

The *Forrest* court declined to follow *Bell*: “[I]t appears the court was particularly influenced by the fact that the trial court, in advising defendant of his rights and obtaining a waiver thereof, repeatedly only referred to defendant’s current, substantive burglary offense. The trial court did not mention the prior conviction except to obtain defendant’s admission of the allegation. . . . The manner in which the trial court in *Bell* administered the advisement had the effect, in our opinion, of implicitly separating the burglary charge from the prior conviction allegation. In this case, however, both the advisement and waiver of defendant’s constitutional rights were preceded by a recitation of the plea bargain which included express reference to both the current offenses and the prior conviction allegations. We therefore decline to follow *Bell* here. We further find that *Bell* incorrectly interprets the requirements of *Yurko* to the extent Bell implies that a separate advisement is always required where defendant, in a single plea proceeding, pleads guilty to a current offense and admits a prior conviction.” (*Forrest, supra*, 221 Cal.App.3d at p. 680, italics omitted.)

The *Forrest* court noted that in *People v. Wright* (1987) 43 Cal.3d 487, the California Supreme Court had rejected the notion that a court must give separate advisements to a defendant who admits arming allegations at the same time as he or she enters a guilty plea. (*Id.* at p. 493, fn. 2.)

Defendant asserts that this case is similar to *Bell*. He claims that here, as in *Bell*, the trial court implicitly separated the substantive charge from the prior prison term allegations, because it advised him that he had a right “to have a jury to decide whether you’re guilty or not guilty of *this offense*.” (Italics added.) Defendant notes that the trial court did not tell him that he also had the right to a jury trial on the prior prison term allegations.

We find this case distinguishable from *Bell*. Before defendant entered his guilty plea and admissions, the prosecutor explained that the plea bargain pertained to both the substantive offense and the prior prison term allegations. The trial court then made it clear that defendant was “pleading to this Information.” Although the trial court did refer to “this offense” when informing defendant of his right to a jury trial, the trial court did not separate out the substantive offense from the prior prison term allegations when informing defendant of his additional constitutional rights and privileges. Moreover, when advising defendant of his privilege against self-incrimination, the trial court explained, “You don’t have to say anything or do anything, and the district attorney would have to prove *any or all of these charges or allegations* beyond a reasonable doubt to that jury . . . .” (Italics added.) The court then explained that “[t]hese charges” carried a potential five-year prison term; the prosecutor had previously explained that defendant would receive two years for the substantive offense and three years for the prior prison term allegations.

We conclude that the record supports the trial court’s determination that defendant’s admissions and plea in case No. S8-08315 were “voluntary and intelligent under the totality of the circumstances.” (*People v. Howard, supra*, 1 Cal.4th at p. 1175.)

Therefore, the trial court did not err by denying defendant's motion to withdraw his pleas and admissions.

### ***B. Breach of Plea Bargain***

Defendant contends the trial court breached the terms of the plea bargain as stated on the record on March 20, 2001, when the trial court told him that it would impose a prison sentence if he failed to appear after his three-day release before sentencing.

As noted above, defendant agreed to plead guilty to one count of forgery in case No. F01925. The People agreed to dismiss the other two counts of forgery as well as the "strike" allegation and the five prior prison term allegations. The prosecutor made it clear that it was an "open" plea, with no promises in terms of sentence.

After defendant agreed to these terms, he requested a temporary release. The trial court granted his request but warned him that he was "guaranteed to go back to the joint" if he did not report to the probation department or return to jail on time.

Penal Code section 1192.5 provides that when a defendant pleads guilty pursuant to a negotiated disposition, and that plea bargain is subsequently disapproved by the trial court, the defendant shall be permitted to withdraw his or her plea if he or she desires to do so. (See *People v. Cruz* (1988) 44 Cal.3d 1247, 1250.) This provision "applies when the trial court withdraws its approval because the defendant fails to appear for sentencing." (*Id.* at p. 1249.) The failure to appear is not a breach of the plea bargain, but "a separate offense . . . . [¶] The imposition of an additional or enhanced sentence for a separately chargeable offense without the benefit of a trial on that charge, and in the absence of a knowing or intelligent waiver, is clearly offensive to the principles of due process." (*Id.* at p. 1253, fn. omitted.) However, there is no due process violation when a plea agreement specifically provides for an increased sentence in the event that the defendant fails to appear for sentencing. (*People v. Masloski* (2001) 25 Cal.4th 1212.)

In *People v. Murray* (1995) 32 Cal.App.4th 1539 (*Murray*), the plea bargain specified that the defendant's maximum sentence would be four years. The trial court granted the defendant's request for a two-week hiatus before serving his sentence, but it warned the defendant that his failure to appear would result in imposition of a prison term of seven years four months. The trial court ultimately imposed a seven year four month sentence.

On appeal, the *Murray* defendant requested that the plea bargain be specifically enforced or that he be permitted to withdraw his plea. The appellate court held that the trial court erred because it had not imposed sentence in accordance with the plea bargain, which expressly provided for a maximum four-year term. (*Murray, supra*, 32 Cal.App.4th at p. 1545.) However, the defendant had waived the issue because he had been given Penal Code section 1192.5 admonitions but had not moved to withdraw his plea at sentencing. (*Id.* at p. 1546.)

In *People v. Jensen* (1992) 4 Cal.App.4th 978 (*Jensen*), the defendant agreed to plead guilty to a charge of being an ex-felon in possession of a firearm, and the prosecution agreed to drop a prior prison term allegation. The plea bargain provided that the defendant would be placed on probation and serve one year in county jail. Defendant requested that the trial court stay execution of sentence temporarily, after sentencing. The trial court announced its policy regarding such stays: it would impose a prison term if the defendant failed to appear on time. At sentencing, the trial court imposed a two-year prison term but noted that it would impose probation if the defendant appeared on time on his surrender date. When the defendant was late, the two-year prison term was imposed.

On appeal, the *Jensen* court reversed and directed the trial court to set aside the defendant's guilty plea. It found "that the return provision was not a valid part of appellant's plea bargain. The trial court, while no doubt well-intentioned, infringed on

appellant's due process rights by maintaining and implementing its return provision policy." (*Jensen, supra*, 4 Cal.App.4th at p. 984.)

This case is somewhat distinguishable from *Murray* and *Jensen*, in that defendant entered into an "open" plea, which did not specify any particular sentence. Thus, under the terms of the plea bargain, the trial court could have imposed probation or a prison sentence of up to five years eight months. However, the plea bargain clearly did not contain a provision specifying that defendant would certainly get a prison sentence if he failed to appear after his three-day release; this condition was added by the trial court. (Compare *People v. Masloski, supra*, 25 Cal.4th 1212; *People v. Vargas* (1990) 223 Cal.App.3d 1107.)

The People unconvincingly argue that the trial court imposed a prison term "based on its evaluation of [defendant] as an unsuitable candidate for probation" rather than based on its prior statement that defendant was "guaranteed" to go to prison if he failed to appear. The trial court's findings at sentencing belie the People's position. After the prosecutor reminded the trial court of its "guarantee[]," the trial court stated, "I'm going to agree with the District Attorney at this point. I gave you the option. It wasn't like you were gone for an extra two weeks or something, but you were gone, and when you didn't return you were telling me, and I think the indication was back then that if you don't come back, you're telling me you don't want a program. You don't want probation. You want the five years. And I think it's appropriate."

Thus, the trial court unilaterally added a provision to the terms of the plea bargain and then imposed sentence in accordance with that provision. Although defendant did not object at sentencing or move to withdraw his plea at that time, he has not waived the issue because the trial court never admonished him pursuant to Penal Code section 1192.5. (Compare *Murray, supra*, 32 Cal.App.4th at p. 1546; see *People v. Walker* (1991) 54 Cal.3d 1013, 1024-1025.) We will therefore remand this case to the trial court

with directions that defendant be permitted to withdraw his plea in case No. F01925 if he chooses.<sup>2</sup>

### ***C. Restitution Fine***<sup>3</sup>

Defendant contends the trial court erred when, at sentencing on January 11, 2002, it imposed a \$1,000 restitution fine in case No. S8-08315. As defendant points out, the trial court had previously imposed a restitution fine of \$200 when it granted probation in that case, on March 18, 1998. The People appropriately concede the error. (See *People v. Chambers* (1998) 65 Cal.App.4th 819.)

### **III. DISPOSITION**

The judgment is reversed and the matter is remanded to permit defendant to exercise his option to withdraw his guilty plea in case No. F01925. If defendant does not withdraw his guilty plea, he shall be resentenced in accordance with the terms of the plea bargain entered on March 20, 2001.

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BAMATTRE-MANOUKIAN, ACTING P.J.

WE CONCUR:

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WUNDERLICH, J.

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MIHARA, J.

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<sup>2</sup> As the People point out, if defendant does choose to withdraw his plea, the original charges and allegations will be reinstated.

<sup>3</sup> We address this issue only to prevent a similar error upon resentencing.